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No. 95-1950

In the Supreme Court of the United States

OCTOBER TERM, 1995

HERBERT W. DUNMEYER, ET AL.,
PETITIONERS,

v.

BECTON DICKINSON AND COMPANY,
RESPONDENT.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO JOINT PETITION FOR WRIT OF CERTIORARI

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Rule 29.6 List of Parent or Subsidiary Corporations

Respondent Becton Dickinson and Company has no parent company. Becton Dickinson and Company owns minority interests in Oncogene Sciences, Inc., Lynx Therapeutics, Inc., and Medi-Ject Corp.

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JURISDICTIONAL STATEMENT

Lack of appellate jurisdiction. This Court cannot properly exercise jurisdiction over the appeal of which petitioners seek review here. The notice that initiated petitioners' appeal was filed on June 7, 1994, some three-and-a-half months before entry of the final order, and encompassed six interlocutory orders. (*See* B-1-4.) On respondent's motion, the Court of Appeals for the Ninth Circuit limited the scope of the appeal by dismissing all but one of the interlocutory orders, for lack of jurisdiction under 28 U.S.C. § 1292 and because the notice of appeal had not been timely filed with respect to those orders. (A-11-12.) The one order that remained before the court of

appeals was a May 11, 1994 order denying motions to intervene. On September 23, 1994, following a settlement of plaintiff's claims against respondent, the district court entered a final order of vacatur and dismissal, rendering the appeal of the orders denying intervention moot.[1] (C-39-40.) Petitioners filed no notice of appeal following the entry of the district court's final order and thus waived any right of appeal from the prior interlocutory orders. Accordingly, although the petition to this Court was timely under Supreme Court Rule 13, there is no basis for this Court's jurisdiction.

Lack of subject matter jurisdiction in the district court. The district court originally exercised jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiff's sole federal claim alleged violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act. This claim lacked several essential elements required under the Act, and in 1992, the district court entered partial summary judgment dismissing it as a matter of law. Thereafter, the court purported to exercise supplemental jurisdiction over the remaining state law claims pursuant to 28 U.S.C. § 1367. Section 1367, however, applies only to civil actions commenced after December 1990, and supplemental jurisdiction would not in any event be available in the absence of a good faith basis for the claim on which original jurisdiction was predicated. The district court declined to determine whether it had diversity jurisdiction over the claims of the class members, which it plainly did not, since most of the claims failed to meet the jurisdictional amount. (Many of the claims were for less than $1,000, and some were as small as $4 or $5.) Following decertification of the class, the Dunmeyer group of petitioners moved to intervene as parties plaintiff. The district court denied their motion in part because "the complaints in intervention fail to allege facts showing an independent basis for jurisdiction." (C-28.)

[1] Because of this settlement, plaintiff was not a party in the court of appeals and is not a party before this Court.

STATEMENT OF THE CASE

Proceedings Below

Plaintiff David Koepke brought this action in August, 1988, purporting to represent a class of field sales representatives employed by the Becton-Dickinson Division of respondent Becton Dickinson and Company ("BD"). As amended, the complaint alleged that BD underpaid its field sales representatives, including petitioners, under the terms of incentive compensation plans in effect during fiscal years 1978 to 1981. Plaintiff claimed that these alleged underpayments constituted breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith denial of the existence of contract, negligence, conversion, breach of fiduciary duty, violations of the California Labor Code, negligent misrepresentation, fraudulent inducement, fraud, and violations of the RICO Act.

In 1991, the district court provisionally certified a class encompassing all field sales representatives employed by BD throughout the nation in BD's fiscal years 1978 through 1981. After approximately fifty percent of the class accepted court-approved offers of settlement from BD, the class included members whose claims arose in some thirty-four different states.

In 1992, BD moved for partial summary judgment on plaintiff's RICO claim on the ground that it lacked any legal basis. The court granted the motion, eliminating the sole federal question from the case.

In 1993, BD moved to decertify the class, pointing out that, under California choice of law principles, the district court would need to apply the conflicting laws of thirty-four different jurisdictions to the ten remaining state law causes of action. BD argued that the need to do so would make the action unmanageable in class form. By order dated August 18, 1993, the court granted BD's motion. (C-16-17.) Applying California's "governmental interest" test, the court deter-

mined that the laws of the class members' states of residence applied to their state law claims. The court also found that "factual as well as legal differences exist which would make trial of this case as a class action unmanageable," and decertified the class.

Plaintiff twice sought to revisit the decertification issue. He filed a motion for reconsideration, which was denied after full briefing and argument (C-18-19), and then a motion to "recertify" the original class based on an entirely new choice of law theory. This, too, was denied after full briefing and argument. (C-22-23.)

On February 1, 1994, the district court issued a notice of decertification to the former class members, informing them, among other things, that "as a result of the Court's rulings, you are no longer a class member in this lawsuit . . . ." The notice further informed its recipients of their right to file their own lawsuits or to move to intervene as parties plaintiff or for purposes of appeal.

In March, 1994, seven former class members (Forster, Jones, Oravetz, Peckels, White, Williams, and Zucht), each represented by James Thomas, plaintiff's attorney, moved to intervene for purposes of appeal. BD did not oppose their request for intervention for purposes of appeal.

At the same time, eight former class members (Dunmeyer, Furuta, Jackson, Johnson, Karch, Kentala, Perret, and Procalo), each of them likewise represented by plaintiff's attorney, moved pursuant to Fed. R. Civ. P. 24 to intervene as parties plaintiff. On May 11, 1994, the district court denied the motion. (C-28-29.) As to intervention of right, the court ruled that the intervenors failed to show (1) that their interests would be impaired or impeded if their claims were not adjudicated in the pending action and (2) that plaintiff would not adequately represent their interests. As to permissive intervention, the court ruled in the exercise of its discretion that intervention would prejudice the existing parties and delay resolution of the case.

On June 7, 1994, while plaintiff's case was proceeding to

trial, plaintiff's counsel filed a notice of appeal from seven interlocutory orders of the court on behalf of the fifteen former class members who had sought intervention either for purposes of trial or for purposes of appeal and who are the petitioners before this Court. The notice (B-1-4) covered the following orders, among others:

> 1. The August 18, 1993 order granting BD's motion to decertify the class;
>
> 2. The September 20, 1993 order denying plaintiff's motion for reconsideration of class decertification;
>
> 3. The January 18, 1994 orders denying plaintiff's motion for "recertification" and denying plaintiff's related motion for partial summary judgment concerning choice of law for the proposed "recertified" class; and
>
> 4. The May 11, 1994 order denying the motions of Dunmeyer, Furuta, Jackson, Johnson, Karch, Kentala, Perret and Procalo to intervene as parties plaintiff.

After the appeal was docketed in the court of appeals, BD moved to dismiss it with respect to all but the last of these interlocutory orders for lack of appellate jurisdiction. On September 16, 1994, the court of appeals granted BD's motion. (A-11-12.) With respect to the first three orders listed above, the court held that (i) none of them was final or immediately appealable, since no final judgment had been entered in the case; and (ii) the appeal was not timely filed under Fed. R. App. P. 4(a)(1) with respect to the three orders. *Id.* The court of appeals thus limited the scope of the appeal to the May 11 order denying intervention.

During the pendency of the interlocutory appeal, the case was selected for inclusion in the Ninth Circuit's mediation program. With the assistance of the mediator, plaintiff and BD achieved a settlement in principle on September 15, 1994. The settlement was conditioned on the district court's entry of an order of vacatur and dismissal.

On September 16, 1994, counsel for the parties (including Mr. Thomas) appeared at a scheduled final pretrial conference, announced the settlement to the trial judge, and dis-

cussed with him the reasons for and implications of vacatur. After briefing on the issue, the judge entered an order of vacatur and dismissal.[2] (C-39-40.)

Petitioners did not file a notice of appeal within thirty days after the final order or at any time thereafter, despite the explicit requirements of Fed. R. App. P. 4. On October 13, 1994, however, petitioners' counsel filed a motion to "expand" the pending interlocutory appeal of the intervention order to encompass additional interlocutory orders and to include review of the final order of vacatur and dismissal itself. (B-5-10.) BD opposed petitioners' motion, which was denied without prejudice, thus deferring the issue for consideration by the full panel. (A-10.)

The court of appeals affirmed the orders of the district court, ruling that the denial of intervention was proper and that it lacked jurisdiction to rule on any other aspects of petitioners' appeal due to their failure to file a notice of appeal after entry of the final order. (A-3-9.) On the latter point, the court of appeals found that petitioners' "motion to expand" their appeal was "not a notice of appeal or the 'functional equivalent' of a notice of appeal." (A-9.)

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[2] In view of Mr. Thomas' participation in the Ninth Circuit mediation and his appearance before the district court to announce the settlement, the assertion in the petition (at p. 9) that the order of vacatur was entered in the absence of petitioners' counsel grossly misstates the facts. Moreover, petitioners' counsel comes before this Court seeking to overturn the very order to which his client assented and upon which the settlement was conditioned. His effort to upset the fundamental premise of a settlement entered into by one client — in which his firm participated financially — in order to advance the supposed interests of other clients is a clear conflict of interest and creates a substantial appearance of impropriety. Counsel's conflict of interest is academic, however, in view of the fact that he failed to file a notice of appeal from the order of vacatur and dismissal and thus, as discussed below, the order is not properly before this Court.

Statement of Facts

Although the issues on appeal are entirely procedural, the petition so distorts the factual background of the case as to require a brief response.[3]

Becton Dickinson and Company is a New Jersey corporation headquartered in New Jersey. It manufactures and sells medical supplies and diagnostic systems for use by health care professionals. During the 1978-81 period, members of the BD sales force who were eligible received, in addition to a fixed salary, payment of incentive compensation.

In each of the four years, BD sent a written description of the applicable provisions of the incentive compensation plan then in effect to the members of its nationwide sales force. The terms of the plans varied from year to year. Each plan contained a formula for making a year-end calculation of the amount of incentive compensation potentially available for distribution on a region by region basis, an amount sometimes referred to as the "regional bonus pool." The bonus formula was stated as a percentage of the region's increase in sales over the prior year plus, if BD exceeded its national sales budget, an additional percentage of the region's sales in excess of budget. *See, e.g.*, C-10-12.

In reciting this bonus formula in their "factual background," petitioners omit mention of the fact that, under the express terms of the plan, the bonus formula was subject to adjustment by BD. The plan sent to field sales representatives in 1979, for example, stated:

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[3] Without detailing each of petitioners' misstatements, BD notes that petitioners assert as truth matters that were merely alleged and that BD categorically denied. Some of the assertions attributed to "BD" or "BD management" are allegations made by a single member of the decertified class, allegations that were denied by BD and that, in any event, pertained to disputed conversations between two individuals. Other statements attributed to "BD management" are taken out of context from individuals who played no role in, and had no knowledge of, management's implementation of the incentive compensation plan.

> B-D Division reserves the right to make adjustments in the above formula in cases of windfall volume, adverse economic factors, or new product sales.

(C-11, ¶ 6.) Similar language appeared in the 1978, 1980, and 1981 plans. Petitioners' claims that they had a legal right to be paid incentive compensation over and above what they received completely ignore this explicit right to adjust the bonus formula.

The evidence, including the sworn testimony and records of the individuals responsible for implementing the plans in the 1978-81 time period, shows BD's compliance with the provisions of the plans in each of the four years in question.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION CONCERNING THE EFFECT OF PETITIONERS' FAILURE TO FILE A NOTICE OF APPEAL DOES NOT WARRANT SUPREME COURT REVIEW.

Petitioners urge this Court to review the question whether the "motion to expand review" they filed in the court of appeals was the "functional equivalent" of a notice of appeal under *Smith* v. *Barry*, 502 U.S. 244 (1992). In *Smith* v. *Barry*, this Court held that a *pro se* prisoner's "informal brief" (a court-generated form sent to *pro se* appellants) was the "functional equivalent" of a notice of appeal and was therefore sufficient to create appellate jurisdiction.

In this case, the court of appeals held that the "motion to expand review" filed by petitioners following the entry of final judgment was "insufficient," since it was neither a notice of appeal nor "the 'functional equivalent' of a notice of appeal." (A-9.) Accordingly, the court of appeals declined to review the several orders cited in petitioners' motion.[4]

[4] This ruling did not affect the court's review of the order denying intervention, as to which petitioners had filed a proper and timely notice of appeal.

Contrary to petitioners' argument, the Ninth Circuit's decision does not *conflict* with *Smith* v. *Barry*, it *applies* it. *See id.*, 502 U.S. at 248. That application was correct. Petitioners filed a motion, not a notice. The motion required a responsive filing by BD, as a notice does not. It did not express a clear intent to pursue an appeal. In contrast to a notice of appeal, the motion argued that appellate review would be *appropriate*, but left it to the court of appeals to decide the scope of the appeal. Lastly, by virtue of the fact that the motion sought to "expand" a prior, pending appeal, it sought to consolidate review of six interlocutory orders with review of the issues raised in the prior appeal, a different result from what would have ensued had petitioners filed a notice of appeal following the entry of the district court's final order. Had they done so, petitioners' second appeal would have required a new filing fee, proceeded along a different briefing schedule, and (in the absence of court-ordered consolidation) been scheduled for argument at a later time.[5]

Even if the court of appeals' application of *Smith* v. *Barry* to the peculiar circumstances of this case were erroneous, that alone would not justify the grant of certiorari. The question petitioners present to this Court is unique and non-recurring,

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[5] Petitioners further argue that the decison below conflicts with *FirsTier Mortgage Co.* v. *Investors Mortgage Ins. Co.*, 498 U.S. 269 (1991). In *FirsTier*, this Court held that, under Fed. R. App. P. 4(a)(2), a prematurely filed notice of appeal from an order that the appellant "reasonably but mistakenly believes to be a final judgment" (498 U.S. at 276) ripens into an effective notice of appeal from the final judgment, once entered. *Id.* at 275. In so ruling, this Court cautioned, "This is not to say that Rule 4(a)(2) permits a notice of appeal from a clearly interlocutory decision . . . to serve as a notice of appeal from the final judgment. A belief that such a decision is a final judgment would *not* be reasonable." *Id.* at 276 (emphasis in original). Petitioners could not reasonably have believed that the interlocutory orders that they had sought to appeal on June 6, 1994 were final orders, particularly since the court of appeals, in its order of September 16, 1994, had ruled that they were not. *FirsTier* confirms that petitioners' expansive interpretation of Rule 4, which essentially would make the filing of a notice of appeal after entry of judgment optional, is not the law.

arising out of petitioners' novel approach to the appellate rules. It is highly unlikely that the courts of appeals are frequently, if ever, confronted with the question whether a motion to "expand review" of an interlocutory appeal can substitute for the filing of a notice of appeal of a later final judgment. (Neither party turned up any case involving facts resembling these in their several briefs on this issue below.)

Were the Court to expend its scarce resources on answering this question, its decision would affect no one but the litigants in this case. This Court has observed that it does not "sit for the benefit of the particular litigants" and generally does not expend its resources on problems of an "academic or episodic" nature. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). In short, this case does not involve "principles the settlement of which is of importance to the public, as distinguished from that of the parties," *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), and thus is not worthy of further review.

II. THE DISTRICT COURT'S DECERTIFICATION AND CHOICE OF LAW RULINGS ARE NOT PROPERLY BEFORE THE COURT AND DO NOT WARRANT REVIEW.

The second question petitioners present for review is whether the district court erred in decertifying a nationwide class action after finding that the class members' ten state-law causes of action would be governed by the conflicting laws of thirty-four different jurisdictions. This issue was not even reviewed in the court of appeals, and in any event raises no federal question.

Because petitioners failed to file a timely notice of appeal of the district court's decertification order, the Ninth Circuit never reached or reviewed the issue. In asking this Court to reach down to the district court level to review the decertification order, petitioners ignore this Court's often expressed unwillingness to review matters not considered in the court

of appeals. This unwillingness has prevailed even when a court of appeals' failure to reach an issue is the result of an error by the court of appeals concerning the proper scope of the appeal. *See, e.g., Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U.S. 479, 481 (1976) (per curiam) (declining to reach merits of petitioner's choice of law argument because the court of appeals had not passed on the issue); *cf. Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 75 n.2 (1973) (ruling that an issue that was an alternative ground for district court's decision but not reached in the court of appeals was "not before this Court").

Further, the issue petitioners would have the Court review turns entirely on the district court's application of *state law*, specifically California's choice of law rules. *See Bernhard* v. *Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (in bank), *cert. denied*, 429 U.S. 859 (1976). Based on its application of these state law rules, the district court concluded that the conflicting laws of the thirty-four states in which class members resided would govern their multiple state-law claims, thereby rendering a class action unmanageable. The court's decision is singularly inappropriate for Supreme Court review, since a ruling on the application of California choice of law rules would involve no federal question at all. *See, e.g., Wolf* v. *Weinstein*, 372 U.S. 633, 636 (1963) (dismissing writ of certiorari as improvidently granted where "the controversy . . . primarily implicates questions of Pennsylvania law and presents no federal question of substance").[6]

Petitioners' attempt to create a federal question where none exists is incoherent. Petitioners argue that since, as a matter of constitutional law, this Court has *permitted* application of one state's laws in multistate diversity class actions in certain circumstances, such an outcome is constitutionally *required* here.

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[6] No question regarding the interpretation or application of Fed. R. Civ. P. 23 is is raised here; petitioners have never disputed that a class action in which multiple states' laws must be applied is unmanageable under Fed. R. Civ. P. 23. *See, e.g.*, Petition, pp. 15-16.

While the Constitution does place some limitations on a forum state's application of its own law to non-resident class members, so as to ensure that the uniform application of that law to the claim of each class member is "neither arbitrary nor fundamentally unfair," *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 821 (1985), (quoting *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302, 312-13 (1981)), the Constitution does not dictate a state's choice of law rules. If, as a matter of state law, California chooses to apply the laws of the class members' states of residence, there is nothing in the Constitution that forbids it from doing so. For petitioners to claim that the district court's choice of law ruling somehow violates *Shutts* or *Sun Oil* v. *Wortman*, 486 U.S. 717 (1988) (permitting uniform application of one state's statute of limitations to a multistate class action) is inexplicable. The question petitioners ask this Court to review involves merely the application of California state law to a particular set of facts presented to the district court. This is scarcely a matter that warrants the attention of this Court.

III. THE PROPRIETY OF THE DISTRICT COURT'S VACATUR ORDER IS NOT PROPERLY BEFORE THE COURT AND IS UNWORTHY OF THE COURT'S ATTENTION.

The third issue petitioners present for review is the propriety of the district court's vacatur order, which was entered in connection with the settlement between BD and plaintiff. This issue is not worthy of review by this Court. As an initial matter, due to petitioners' failure to file a notice of appeal, the Ninth Circuit never reached the issue, so there is no court of appeals decision to review.

Nonetheless, petitioners argue that the Court should reach down to the district court to correct asserted error. According to petitioners, the district court lacked jurisdiction to enter a vacatur order, and its order conflicts with cases in this Court and the Sixth and Eighth Circuits. These arguments are factu-

ally and legally erroneous.

The gist of petitioners' jurisdiction argument is that, due to petitioners' then pending interlocutory appeal in the Ninth Circuit, the district court was without jurisdiction to vacate its own prior interlocutory orders. At the time the district court entered its order of vacatur and dismissal on September 23, 1994 (*see* C-39-40), however, the Ninth Circuit had already, by an order dated September 16, 1994, limited the scope of petitioners' interlocutory appeal to the intervention issues only. (A-11-12.) Petitioners evidently contend that any time a district court denies a motion to intervene and the intervenor appeals, the court is divested of jurisdiction to modify or vacate prior interlocutory orders, notwithstanding the explicit provision in Fed. R. Civ. P. 54(b) that an interlocutory order is "subject to revision at any time before the entry of [final] judgment."

There is no merit to this argument, and there is no conflict with *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam); *Fort Gratiot* v. *Michigan Department of Natural Resources*, 71 F.3d 1197 (6th Cir. 1995); or *Liddell* v. *Board of Education*, 73 F.3d 819 (8th Cir. 1996), cited by petitioners. These cases all stand for the unexceptional proposition that when a case is on appeal, the district court will not exercise jurisdiction over the case except in aid of the appeal. These cases do not address what occurs when an interlocutory appeal is taken. They certainly do not hold that an interlocutory appeal brings all matters in the district court to a standstill, which, as a matter of settled law, it does not. *See generally* 9 Moore's Federal Practice ¶ 203.11 at 3-54-55 (1996).

Petitioners further argue that the vacatur contravened this Court's ruling in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 130 L. Ed. 2d 233 (1994). They are wrong. To begin, *U.S. Bancorp* concerned vacatur of a final judgment. The district court here did not vacate a final judgment; it merely vacated its interlocutory orders, as permitted under Fed. R. Civ. P. 54(b).

Moreover, before vacating the interlocutory orders, the district court, in an abundance of caution, applied the Ninth Circuit standard for vacatur of final judgments. *See Bates* v. *Union Oil Co.*, 944 F.2d 647, 650 (9th Cir. 1991) (quoting *Ringsby Truck Lines* v. *Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982)), *cert. denied*, 503 U.S. 1005 (1992). The district court duly applied the *Bates/Ringsby* standards, considering the competing values of "finality of judgment and right to relitigation of unreviewed disputes." (C-39.) Among other things, the district court considered the fact that there was no "interest in finality" here, because there had been no final judgment. Further, there was a strong interest in permitting relitigation of the issues because the parties had come to a settlement *prior to trial*. The vacatur of all interlocutory orders was a condition of settlement. Had the district court not vacated the orders, the parties would have been put to the burden and expense of a trial and an appeal in a case they both wished to settle.

The balancing inquiry conducted by the district court judge under the *Bates/Ringsby* standard is entirely consistent with, and, in fact, exemplifies the principles governing vacatur set forth in *U.S. Bancorp*. In *U.S. Bancorp*, this Court concluded that when a case settles during the pendency of an appeal of a final judgment, (1) vacatur of the judgment below should not be automatic, but should instead result from a determination that vacatur is appropriate in the circumstances of the case; and (2) the balancing of competing considerations required to determine the appropriateness of vacatur is best done by the district court, not an appellate court. *U.S. Bancorp*, 115 S. Ct. at 393. To the extent that it was even necessary, given the fact that no judgment had entered, the district court's careful application of the *Bates/Ringsby* standard here was a textbook example of a vacatur meeting all of the conditions set forth in *U.S. Bancorp*.

IV. THE DENIAL OF INTERVENTION IMPLICATES NO CONFLICT BETWEEN THE CIRCUITS AND IS NOT SUFFICIENTLY IMPORTANT TO WARRANT REVIEW.

Petitioners, lastly, ask this Court to review the Ninth Circuit's ruling that the district court properly denied their motions to intervene as of right. This issue does not warrant a writ of certiorari.

A. *The Issue of Intervention is Moot, And Any Decision in Petitioners' Favor Would Have No Practical Effect in Any Event.*

Mootness. As a matter of Ninth Circuit law, the issue of intervention was rendered moot by the settlement of the underlying action. *See United States* v. *Ford*, 650 F.2d 1141, 1143 (9th Cir. 1981) (dismissing as moot appeal of denial of motion to intervene because "there is no proceeding in which appellants can intervene"), *cert. denied sub nom. Midwest Growers Cooperative* v. *United States*, 455 U.S. 942 (1982). Were this Court to rule that the denial of intervention was improper, the Ninth Circuit, upon remand, would simply dismiss the matter as moot. For this reason, as to the intervention issue, the petition for certiorari itself should be dismissed as moot.

No practical effect. When the district court denied intervention as of right, it held that petitioners had failed to show *either* (1) that their interests would be "impair[ed] or impede[d]" in the absence of intervention, *or* (2) that plaintiff would not adequately represent their interests. The Ninth Circuit affirmed the district court's ruling on the "impair or impede" test and thus found it unnecessary to address the adequacy of representation issue. Since petitioners had the burden of meeting both tests, even if this Court ruled in favor of petitioners on the narrow issue they present, this Court's decision would have no practical effect even if the Ninth Cir-

cuit for some reason declined to dismiss the matter as moot. The Ninth Circuit would simply consider the district court's ruling that there was no right of intervention because plaintiff adequately represented petitioners' interests. Given that petitioners were represented by the same attorney representing plaintiff and asserted exactly the same arguments as those that were being pressed by plaintiff at the time of the ruling, it is highly unlikely that the court of appeals would disturb the district court's order. *See Blake* v. *Pallan*, 554 F.2d 947, 954-55 (9th Cir. 1977); *Union Central Life Insurance Co.* v. *Hamilton Steel Products, Inc.*, 374 F.2d 820, 823 (7th Cir. 1967).

B. *The Ninth Circuit's Decision Does Not Conflict with Decisions in Other Circuits.*

The court of appeals rejected petitioners' argument that denial of intervention "impaired or impeded" their interests within the meaning of Rule 24(a). It did so on the ground that petitioners had not shown "how [their] interests would be hurt by bringing separate suits" (A-7), which they were then and are still free to do. The court further held:

> [Petitioners] argue[] that courts must allow intervention even if the applicant could simply file another action but would suffer inconvenience and waste effort as a result. Our precedent rejects this position. "Mere inconvenience" or supposed judicial economy considerations are not enough to mandate intervention as of right.

(A-6-7.) This eminently reasonable conclusion is consistent with the rulings of other circuits. Moreover, the decisions from other circuits that supposedly give rise to the conflict with the Ninth Circuit were rendered in the 1960's and 1970's. Thus, the asserted conflict is of doubtful urgency.

District of Columbia Circuit. Petitioners cite *Natural Resources Defense Council* v. *Costle*, 561 F.2d 904 (D.C. Cir.

1977) ("*NRDC*") and *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967), to support their claim of conflict between the Ninth and District of Columbia circuits. On their facts, however, both of these cases closely resemble cases in which the Ninth Circuit, too, has held that a party was entitled to intervene as of right. In both *NRDC* and *Nuesse*, the proposed intervenors' interests would have been severely impaired had they been forced to bring separate suits.

In *NRDC*, various corporations sought intervention in order to participate in rulemaking proceedings required by a proposed settlement that would regulate their industries. In these circumstances, the alternative of a later challenge to the regulations promulgated as a result of the settlement would pose far more than mere inconvenience. In *Nuesse*, a state banking commissioner sought intervention in a case of first impression that would critically affect the banks within the commissioner's jurisdiction and control. Had the commissioner been excluded, he might later have had to bring a new proceeding to undo what had been done in the initial action.

These cases are similar to Ninth Circuit cases such as *United States* v. *Stringfellow*, 783 F.2d 821 (9th Cir. 1986), *vacated on other grounds*, 480 U.S. 370 (1987), in which the Ninth Circuit *approved* intervention of right. In *Stringfellow*, the Ninth Circuit ruled that neighbors of a hazardous waste site could intervene as of right in order to participate in the adjudication of a remedial plan for the site.

In all of these cases, something substantially more than the inconvenience of having to file a new suit was at stake. No case from either circuit stands for the proposition that the mere burden of initiating a new lawsuit is sufficient to meet the "impair or impede" test. If petitioners' position were correct, it would be easier to intervene as of right than to intervene permissively.

Fifth Circuit. Petitioners cite *Diaz* v. *Southern Drilling Corp.*, 427 F.2d 1118 (5th Cir.), *cert. denied sub nom. Trefina* v. *United States*, 400 U.S. 878 (1970), to show that the Fifth Circuit's intervention standard is in conflict with the

standard applied below. Petitioners neglect to mention that since *Diaz* — which would not support intervention in the context of this case in any event — the Fifth Circuit has clarified its intervention standard. In *United States* v. *Texas Eastern Transmission Corp.*, 923 F.2d 410 (5th Cir. 1991), the court ruled that the commonwealth of Pennsylvania could *not* intervene as of right in a suit filed by the Environmental Protection Agency against the operator of a gas pipeline that passed through Pennsylvania, despite the obvious impact that the proposed settlement of the action would have on Pennsylvania. *Texas Eastern* does not support petitioners' assertion that the Fifth Circuit applies a more lenient standard to intervention as of right than does the Ninth Circuit.

In the end, the supposed differences among the courts of appeals are merely semantic and reflect the peculiar facts of each case. *See generally Miroyan* v. *United States*, 439 U.S. 1338, 1343 (1978) (Opinion in Chambers, Rehnquist, J.) (noting that, even where an inter-circuit conflict is identifiable, "the Court is not likely to grant certiorari in [the] case unless such an action would appear to offer the strong likelihood of deciding an issue on which a square conflict exists"). Petitioners have not pointed to any decision in which one circuit has identified a difference between its standard and the standard applied in another circuit. Nor have petitioners pointed to a decision in *any* circuit court of appeals granting intervention as of right on facts similar to those here.

This case does not involve the sort of "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" that prompts this Court to grant the writ of certiorari. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923) (dismissing writ of certiorari on the ground that the assertedly conflicting decisions of the courts of appeals "were really in harmony and not in conflict"). Petitioners' rhetoric about "flexibility" and "judicial efficiency" is inadequate to show any conflict between the circuits or any other reason for this Court to review the intervention issue.

CONCLUSION

For the foregoing reasons, respondent Becton Dickinson and Company respectfully requests that this Court deny the Joint Petition for Writ of Certiorari.

Respectfully submitted,

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